In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-241

STATE OF MISSOURI,
Petitioner,

vs.

ALL STAR NEWS AGENCY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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ALL STAR NEWS AGENCY, INC.,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

Petitioner, The State of Missouri, prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Missouri entered in this proceeding on April 10, 1979.

OPINION BELOW

The opinion of the Supreme Court of Missouri is reported at 580 S.W.2d 245 (Mo. banc 1979). In that court the case was styled and numbered as follows: State of Missouri, Respondent v. All Star News Agency, Inc., Appellant (2 cases), Nos. 60,609 and 60,616 in the Supreme Court of Missouri. A copy of the opinion is reprinted in Appendix A.

JURISDICTION

Judgment was entered in the Supreme Court of Missouri on April 10, 1979. A motion for rehearing was denied May 17, 1979, and this petition is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether §542.281(5), RSMo 1975 Supp., necessarily imposes a constitutionally impermissible prior restraint on materials presumptively protected by the First Amendment to the United States Constitution.

2. Whether the restraint of presumptively protected materials for a ten-day period prior to the commencement of an adversary hearing to determine whether there is probable cause to believe that those materials are obscene constitutes a constitutionally impermissible prior restraint.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, First Amendment, reads as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

United States Constitution, Fourth Amendment, reads as follows:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Fourteenth Amendment, reads in pertinent part as follows:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Sections 542.281 and 542.301, RSMo 1975 Supp., are set forth in Appendix B.

STATEMENT OF THE CASE

Most of the pertinent facts are set forth in the opinion handed down by the Supreme Court of Missouri on April 10, 1979. *State v. All Star News Agency, Inc.*, 580 S.W.2d 245 (Mo. banc 1979). This statement of the case will begin by quoting extensively from the opinion of the Supreme Court of Missouri before concluding by presenting the additional facts which were not outlined in that court's opinion. (It should be noted that respondent All Star News Agency, Inc., is referred to throughout the opinion of the Supreme Court of Missouri as "Appellant.")

"This appeal involves two civil proceedings, consolidated here and at trial, wherein the State seeks forfeiture and destruction, under §§ 542.281 and 542.301.3, RSMo Supp. 1975 of magazines and movies seized from appellant. Appellant was a wholesale distributor of magazines and movies in St. Louis.

The statutes involved provide a civil procedure whereby the State may search for, seize, and destroy obscene material. In general terms they provide, where twenty or more items are at issue, for a four-stage process. First, upon application of the State to a court for a warrant to search for and seize obscene material, the dealer or exhibitor of the obscene matter must be given notice and an adversary hearing. Once notice is received, any removal or alteration of the material at issue is punishable by contempt. Second, an adversary hearing must be held before a search warrant for such material may issue. The purpose of the hearing is to determine whether there is probable cause to believe that the material is located where alleged and will ultimately be found to be obscene. Third, if a warrant issues, a determination of obscenity is made by an advisory jury. Fourth, the trial judge determines, after the jury verdict, whether the material is obscene or not obscene as a matter of law. If the material is obscene, an order of forfeiture and destruction issues.

The proceedings at issue in this appeal are virtually identical except that one involves the seizure solely of movie films while the other involves the seizure solely of magazines. Over 1,000 films were seized. Nearly 13,000 magazines were seized.

The first proceeding was commenced on September 9, 1977, by issuance and service upon appellant of a Notice of Adversary Hearing. The notice listed the

material for which a search warrant was being sought and in substance stated, as provided by § 542.281.5, that 'After service of notice of the hearing, intentional alteration, destruction, or removal of any matter, or duplicate of matter, described in the notice shall be punished as contempt of court.' A police officer was stationed at appellant's warehouse to insure that no material was removed.

The adversary hearing began September 19, 1977. This proceeding involved movie films.

The second proceeding progressed similarly. It commenced on September 21, 1977, by issuance and service of a Notice of Adversary Hearing. The notice contained the same warning against removal or alteration of the material listed as in the proceeding involving movie films. A police officer was stated at appellant's warehouse to insure that no material was removed. The adversary hearing was held September 23, 1977. This proceeding involved magazines." *Id.* at 246-247.

On January 11, 1978, the Circuit Court of the City of St. Louis ordered the forfeiture and destruction of the many magazines and films which had been declared obscene in those two civil proceedings which were described above. Those two proceedings were consolidated at trial and on appeal to the Supreme Court of Missouri; they remain consolidated before this Court.

The Supreme Court of Missouri reversed and remanded in an opinion rendered April 10, 1979. The reversal and remand was premised on the Missouri Supreme Court's conclusion that the materials in question had been subjected to a constitutionally impermissible prior restraint between the time the notices of adversary hearing were served and the adversary hearings were held. A motion for rehearing

was denied May 17, 1979. A writ of certiorari to the Supreme Court of Missouri is being sought pursuant to 28 U.S.C. §1254(1).

REASONS FOR GRANTING THE WRIT

This petition for a writ of certiorari should be granted primarily because, in reversing the decision of the Circuit Court of the City of St. Louis, the Supreme Court of Missouri misinterpreted some prior decisions of this Court and overlooked others. In addition, certiorari should be granted because the Supreme Court of Missouri has rendered impotent a statutory scheme that was designed to be and can be a valuable tool in curtailing the operations of distributors of obscene materials.

The reversal and remand in this case was premised on the Missouri Supreme Court's conclusion that the materials in question had been subjected to a constitutionally inpermissible prior restraint between the time the notices of adversary hearing were served and the adversary hearings were held. The prior restraint which was held to be constitutionally impermissible was the result of the application of the following provision of §542.281(5), RSMo 1975 Supp.:

> "After service of notice of the hearing, intentional alteration, destruction, or removal of any matter, or duplicate of matter, described in the notice shall be punished as contempt of court."

The foregoing provision was included in notices served on respondent. In reversing and remanding, and in questioning the propriety of the foregoing statutory provision in the course of doing so, the Missouri Supreme Court misinterpreted some prior decisions of this Court and overlooked others.

This case arose in a unique factual setting which found thousands of allegedly obscene magazines and films stored in a massive pornography warehouse operated by respondent. In striving for the forfeiture and destruction of the allegedly obscene material, petitioner utilized its civil anti-obscenity statutes. Respondent was served with notices of adversary hearing which included references to the foregoing statutory provision and received those adversary hearings shortly thereafter within the time contemplated by the law. The prior restraint which the Missouri Supreme Court ruled was constitutionally impermissible took place between the time of the service of the notices of adversary hearing and the adversary hearings themselves. The first proceeding began when a notice of adversary hearing was served upon the respondent on September 9, 1977; the materials listed in the notice were allegedly obscene films. The initial adversary hearing itself commenced September 19, 1977. Two days later, on September 21, 1977, a second notice of adversary hearing was served upon respondent, this one listing allegedly obscene magazines. This second adversary hearing was held September 23, 1977. Consequently, the prior restraint which was held to be constitutionally impermissible by the Missouri Supreme Court lasted ten days for the films and two days for the magazines. This particular prior restraint was a constitutionally permissible one and the Missouri Supreme Court overlooked material matters of law and fact in holding to the contrary.

The Missouri Supreme Court's opinion cited five United States Supreme Court cases and then listed five "teachings" of those cases. 580 S.W.2d at 247. However, the cited cases do not support the following two "teachings" as construed by the Missouri Supreme Court's opinion:

"(3) that a prior restraint of one copy of each magazine or film alleged to be obscene may be permissible in order that a determination of the question of probable obscenity may be made.

. . .

"(5) that a restraint, prior to a judicial adversary hearing, of more material than is necessary for determination of the question of probable obscenity is constitutionally impermissible." *Id.*

Since the foregoing "teachings" as construed by the Missouri Supreme Court are not supported by the five cited United States Supreme Court cases or by any others, the Missouri Supreme Court had no authority to apply those "teachings" as the law. Particular attention should be paid to *Oregon v. Hass*, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975), wherein this Court reversed a decision of the Oregon Supreme Court which had been premised on a more restrictive interpretation of United States Supreme Court decisions than was permissible. In doing so, this Court referred to its earlier expressions

"that a State is free as a matter of its *own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon Federal Constitutional standards [citations omitted] but, of course, a State may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." *Id.*, 420 U.S. at 719.

See also North Carolina v. Butler, ... U.S. ....., 99 S.Ct. 1755, 1759, ... L.Ed.2d ..... (1979).

Consequently, the Missouri Supreme Court went beyond its authority in interpreting the United States Supreme Court cases as upholding the foregoing "teachings."

The Missouri Supreme Court apparently used those two "teachings" in reaching its conclusion that the restraint of all copies of the magazines and films listed in the notices of adversary hearing between the time those notices were served and the adversary hearings were held was constitutionally impermissible. However, that court's reliance on those "teachings" overlooks the unique factual setting in which this case arose. Respondent was operating a massive pornography warehouse which contained numerous copies of the allegedly obscene magazines and films. If only one copy of each magazine and film had been restrained, then the utilization of the civil anti-obscenity statutes in this case would have been to no avail. Respondent could simply have removed the additional copies of those magazines and movies. The one case cited by the Missouri Supreme Court which dealt with the single copy concept was *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973). However, in that case this Court was comparing the seizing of a single copy of a film for the purpose of preserving it as evidence in a criminal proceeding with the seizing of films to destroy them or to block their distribution or exhibition. *Id.*, 413 U.S. at 492. The instant case did not present a situation in which there was a seizing of films and/or magazines to destroy them or to block their distribution or exhibition; rather, the instant case presents a situation in which a pornography wholesaler faced the risk of contempt of Court if it chose to remove or distribute the items listed in the notices of adversary hearing. In this type of situation, a restraint on only one copy of the various items would have been meaningless. This was not a criminal prosecution such as was involved in *Heller v. New York*; rather, it was a civil proceeding in which petitioner was seeking the forfeiture and destruction of certain obscene magazines

and films. In that sense there was no basis for the Missouri Supreme Court's reliance on a single copy concept.

As the foregoing discussion indicates, the primary problem with the "teachings" outlined in the Missouri Supreme Court's opinion is that they overlook some other well established principles of law. That is perhaps the primary reason why this petition should be granted. While any system of prior restraint comes to the court bearing a heavy presumption against its constitutional validity, *Bantam Books v. Sullivan,* 372 U.S. 58, 70, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963), prior restraints are not unconstitutional per se. *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 558, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). Rather, in assessing the validity of a given restraint, a court is obliged to look at the application of the statute in question to the facts of the case before it to determine whether the restraint being imposed rises to an impermissible level. *Roaden v. Kentucky,* 413 U.S. 496, 501, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973); *G. I. Distributors, Inc. v. Murphy,* 490 F.2d 1167, 1169 (2nd Cir. 1973), *cert. denied,* 416 U.S. 939, 94 S.Ct. 1941, 40 L.Ed.2d 290 (1974). The restraint imposed in the instant case was sufficiently limited in time and nature, and justified in principle, to keep it within the realm of the permissible.

It has been suggested that certain temporary restraints may be justified while necessary judicial proceedings are under way. *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. at 557, 559. In that case, this Court outlined in detail the procedural safeguards necessary to render a prior restraint lawful.

> "*First,* the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second,* any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third,* a prompt final judicial determination must be assured." *Id.* at 560.

See also Blount v. Rizzi, 400 U.S. 410, 417, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971); *Freedman v. Maryland,* 380 U.S. 51, 58-59, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).

Applying these standards, the restraint created by the notices of adversary hearing in the instant case appears reasonable. It is the second procedural safeguard which could conceivably present a problem in this case. However, the restraint imposed by the notices in advance of a judicial determination of probable cause was limited to ten days as to the films and two days as to the magazines. The particular restraint imposed was only that necessary to prevent any removal or destruction of the materials. There was no actual physical seizure, but merely the threat of contempt imposed for any removal of the described materials. *See Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 442-443, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957). The period utilized by the trial court in assessing the materials given it for consideration at the adversary hearings can be readily characterized as a fixed period compatible with sound judicial discretion. If the distributors of challenged materials are going to request that those materials be carefully scrutinized in obscenity determinations, they must allow adequate time for such scrutiny. Furthermore, after reviewing the procedure employed by customs officials in seizing allegedly obscene photographs, this Court noted in *United States v. Thirty-seven (37) Photographs,* 402 U.S. 363, 373, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971), that seizure of allegedly obscene materials would come within its procedural mandates if the judicial forfeiture proceedings are begun within fourteen days of the seizure

and if the period between the filing of the action and the final decision of the trial court is no longer than sixty days. While not exactly analogous, the restraint effected by the notices of adversary hearing in the instant case falls easily within those boundaries.

A further justification for the contempt warning in the notice lies in the reasonable concern that, without the prohibition on removal, the distributor might utilize the time period between the service of the notice of adversary hearing and the adversary hearing itself for the removal of allegedly obscene items in order to avoid their destruction or prosecution. The distributor, given notice of an adversary hearing for its own benefit, must not be allowed to pervert that notice to avoid obscenity statutes. *Kingsley Books, Inc. v. Brown*, 354 U.S. at 440. The contempt warning in the notice reduces the possibility of abuse by the wholesaler of allegedly obscene magazines and movies.

In addition, as noted earlier, the type of restraint imposed here, a threat of contempt citation for removal of certain described materials, is not an absolute restraint of the type imposed by seizure; it simply prohibited respondent from removing materials unprotected because of their obscene nature. The restraint of a particular item could be challenged by defiance of the order, coupled with the claim of nonobscenity as a defense to the contempt citation. *Id.* at 442-443. Applying the foregoing principles to the facts of the instant case, it cannot be said that the restraint imposed was a constitutionally impermissible one. The Supreme Court of Missouri had no basis for holding that the prior restraint imposed during the limited time period between the service of the notices of adversary hearing and the adversary hearings themselves was a constitutionally impermissible one.

In effect, the Missouri Supreme Court has rendered useless a statutory scheme that was designed to be and can be a valuable tool in combating the distribution of obscene materials. By implicitly holding that §542.281 (5), RSMo 1975 Supp., necessarily imposes a constitutionally impermissible prior restraint on materials presumptively protected by the First Amendment to the United States Constitution, the Missouri Supreme Court has rendered impotent Missouri's civil anti-obscenity statutes. There is simply no reason to utilize the statutes if the contempt warning cannot be placed in the notice of adversary hearing. As noted earlier, without the prohibition on removal, the distributor of obscene materials might utilize the time period between the service of the notice of adversary hearing and the adversary hearing itself for the removal of the allegedly obscene items in order to avoid their forfeiture and destruction. The contempt warning in the notice, which has a limited life span, reduces the possibility of abuse by the wholesaler of allegedly obscene magazines and films. The Missouri Supreme Court opinion apparently means that the statutory scheme can pass constitutional muster only if the contempt warning is issued for one copy of the listed magazines and films rather than all copies. However, the issuance of a contempt warning for only one copy of the allegedly obscene magazines and films would be an exercise in futility. The purpose of the statutory scheme is to bring about the forfeiture and destruction of obscene materials. That statutory scheme is useless if the State of Missouri has to issue a notice of adversary hearing for each copy of an allegedly obscene magazine or film. The distributor of obscene materials can simply dispose of the copies and suffer the inconvenience of forfeiting one copy so that that one copy can be destroyed. In the instant case, for example, respondent All Star News Agency, Inc., could

have sold all but one copy of each allegedly obscene magazine and film had the contempt warning in the notice of adversary hearing been applicable only to one copy. The importance of this case is that the Missouri Supreme Court has rendered useless a statutory scheme which could be invaluable in putting distributors of obscene, i.e., constitutionally unprotected, materials out of business. This petition for a writ of certiorari should be granted because the Supreme Court of Missouri accomplished this by misinterpreting some prior decisions of this Court and overlooking others.

On June 11, 1979, this Court reached its decision in *Lo-Ji Sales, Inc. v. New York,* ..... U.S. ....., 99 S.Ct. 2319, ... L.Ed.2d ..... (1979). It was held in that case that an open-ended search warrant for obscene materials which left it entirely to the discretion of the officials conducting the search to decide what items were likely obscene and to accomplish their seizure was constitutionally invalid. *Id.*, 99 S.Ct. at 2324. In the instant case there was an issue before the Supreme Court of Missouri dealing with the propriety of what respondent All Star News Agency, Inc., considered to be open-ended search warrants. Since the Supreme Court of Missouri did not reach that particular issue in reversing and remanding the case, this Court's decision in *Lo-Ji Sales, Inc. v. New York, supra,* does not render moot the issues being presented in this petition for a writ of certiorari. Even if it is assumed that some of the materials seized from respondent All Star News Agency, Inc., were seized under authority of constitutionally invalid search warrants, there is still a reason to grant this writ because many of the items seized were sufficiently specified in the search warrants. There was no open-ended search warrant problem with many of the materials seized in the proceedings declared invalid for other reasons by the Missouri Supreme

Court. In other words, the fact that this Court has decided *Lo-Ji Sales, Inc. v. New York* should have no impact on the decision as to whether certiorari should be granted in the instant case.

By granting certiorari in this case, this Court will have the opportunity to consider issues of extreme importance to states which have enacted and are considering enacting civil anti-obscenity statutes.

CONCLUSION

For the above and foregoing reasons, the petition for a writ of certiorari to the Supreme Court of Missouri should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATE OF MISSOURI,
Respondent,
v.
ALL STAR NEWS AGENCY, INC.,
Appellant (two cases).

Nos. 60609, 60616.

SUPREME COURT OF MISSOURI,
En Banc

April 10, 1979

Rehearing Denied May 17, 1979

PER CURIAM:

This appeal involves two civil proceedings, consolidated here and at trial, wherein the State seeks forfeiture and destruction, under §§542.281 and 542.301.3, RSMo Supp. 1975 of magazines and movies seized from appellant. Appellant was a wholesale distributor of magazines and movies in St. Louis.

The statutes involved provide a civil procedure whereby the State may search for, seize, and destroy obscene material. In general terms they provide, where twenty or more items are at issue, for a four-stage process. First, upon application of the State to a court for a warrant to search for and seize obscene material, the dealer or exhibitor of the obscene matter must be given notice and an adversary hearing. Once notice is received, any re-

moval or alteration of the material at issue is punishable by contempt. Second, an adversary hearing must be held before a search warrant for such material may issue. The purpose of the hearing is to determine whether there is probable cause to believe that the material is located where alleged and will ultimately be found to be obscene. Third, if a warrant issues, a determination of obscenity is made by an advisory jury. Fourth, the trial judge determines, after the jury verdict, whether the material is obscene or not obscene as a matter of law. If the material is obscene, an order of forfeiture and destruction issues.

The proceedings at issue in this appeal are virtually identical except that one involves the seizure solely of movie films while the other involves the seizure solely of magazines. Over 1,000 films were seized. Nearly 13,000 magazines were seized.

The first proceeding was commenced on September 9, 1977, by issuance and service upon appellant of a Notice of Adversary Hearing. The notice listed the material for which a search warrant was being sought and in substance stated, as provided by §542.281.5, that "After service of notice of the hearing, intentional alteration, destruction, or removal of any matter, or duplicate of matter, described in the notice shall be punished as contempt of court." A police officer was stationed at appellant's warehouse to insure that no material was removed.

The adversary hearing began September 19, 1977. This proceeding involved movie films.

The second proceeding progressed similarly. It commenced on September 21, 1977, by issuance and service of a Notice of Adversary Hearing. The notice contained the same warning against removal or alteration of the

material listed as in the proceeding involving movie films. A police officer was stationed at appellant's warehouse to insure that no material was removed. The adversary hearing was held September 23, 1977. This proceeding involved magazines.

The cases pertinent to this appeal are *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957); *Marcus v. Search Warrant,* 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961); *A Quantity of Books, et al. v. Kansas,* 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809 (1964); *Heller v. New York,* 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973); and *Roaden v. Kentucky,* 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973).

[1-5] In our opinion, insofar as they pertain to the facts and issues on this appeal, the teachings of these cases are:

(1) that all materials alleged to be obscene are presumptively protected under the First Amendment.

(2) that, as a general proposition, no restraint on dissemination of presumptively protected material prior to a judicial adversary hearing on the question of probable obscenity is constitutionally permissible.

(3) that a prior restraint of one copy of each magazine or film alleged to be obscene may be permissible in order that a determination of the question of probable obscenity may be made.

(4) that the ultimate purpose of the taking of such copy (for use as evidence at a criminal trial; for use as evidence in an injunction proceeding; or for destruction) is irrelevant.

(5) that a restraint, prior to a judicial adversary hearing, of more material than is necessary for a deter-

mination of the question of probable obscenity is constitutionally impermissible.

[6] In the instant case, there were restraints of all copies of magazines and movies in the warehouse between the time the notices of adversary hearing were served and the adversary hearings were held. There were prior restraints of materials presumptively protected under the First Amendment. This was constitutionally impermissible under the First, Fourth, and Fourteenth Amendments. Since a violation of these Amendments infected the proceedings, in order to vindicate appellant's constitutional rights the judgments must be reversed, and the causes remanded for further proceedings not inconsistent with this opinion. *Marcus,* supra, 367 U.S., l.c. 738, 81 S.Ct. 1708.

The judgments are reversed and the causes remanded.

MORGAN, C. J., and BARDGETT, RENDLEN, SIMEONE and WELLIVER, JJ., concur.

DONNELLY, J., concurs in separate concurring opinion filed.

SEILER, J., concurs and concurs in separate concurring opinion of DONNELLY, J.

DONNELLY, Judge, concurring.

These are the latest in a line of cases in which we deal with the question of obscenity by application of law announced by the United States Supreme Court. I concur, but, at the risk of being considered presumptuous, have some observations to make.

In *Roth v. United States,* 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), the United States Supreme Court began to seriously grapple with the question of obscenity.

It would serve no useful purpose here for me to describe the twists and turns which culminated in *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). It is enough to note that the author of *Roth* has reached the conclusion "that the time has come to make a significant departure" from the *Roth* approach. *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 73, 74, 93 S.Ct. 2628, 2642, 37 L.Ed.2d 446 (1973) (Brennan, J., dissenting).

For me, the problem of regulating obscenity involves an attempt to reconcile two competing interests: the right *to speak freely* and the right *to privacy.* The right to speak freely needs no explication from me. It is the favorite of all libertarians and has properly dominated the thinking of our people throughout the history of our Nation. The right to enjoy life (from which the right to privacy derives) has not received the literary attention it deserves.

In December, 1890, Samuel D. Warren and Louis D. Brandeis noted that "in very early times, the law gave a remedy only for physical interference with life," but that later "there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,—the right to be let alone * * *." Warren & Brandeis, *The Right to Privacy,* 4 Harv.L.Rev. 193 (1890). Nearly thirty-eight years later, in different context, Mr. Justice Brandeis referred to "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States,* 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting).

How does all of this relate to obscenity? In my view, unsolicited obscenity is an assault on the spiritual nature,

the feelings and the intellect of the individual. It is an assault on the right to privacy. It is an assault on the right to be let alone. When a person is exposed to obscenity involuntarily, it violates "the right most valued by civilized men."

In my view, when obscenity is at issue, and a choice must be made between the right to speak freely and the right to privacy—the right to be let alone, the right to speak freely must yield.

If such concept were adopted, I would anticipate the following results:

(1) that obscenity would be protected by the First Amendment and that the right to communicate obscenity to prior consenting adults would be absolute. The right to be let alone can be waived and would be waived by prior consenting adults.

(2) that although obscenity were protected by the First Amendment, the right to communicate obscenity would be accommodated to the right of persons generally not to be exposed to it—to be let alone. This would give recognition to an overriding concern where state interests of protecting children and unconsenting adults were involved. *See Redrup v. New York,* 386 U.S. 767, 769, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967).

(3) that a new definition of obscenity would be adopted. If it were established law that the freedom to communicate obscenity to prior consenting adults is absolute, a definition of obscenity which would *fully* serve state interests of protecting children and unconsenting adults would seem appropriate. Certainly, limiting proscriptions of offensive material to hard-core pornography would be grossly inappropriate. *See Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

(4) that the essential problem in obscenity cases would shift from one of defining "obscenity" to one of defining "prior consent." Hopefully, this problem would prove less intractable.

(5) that any *prior restraint* on the right to communicate obscenity would violate the First Amendment. *See* Emerson, *The Doctrine of Prior Restraint,* 20 Law & Contemp.Prob. 648 (1955).

Of course, the scholars will recognize that the concepts I espouse today emanate from the writings of Sir William Blackstone (4 *W. Blackstone, Commentaries* 151-152):

> "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment. Neither is any

restraint hereby laid upon freedom of thought or inquiry; liberty of private sentiment is still left; the disseminating or making public of bad sentiments, destructive of the ends of society, is the crime which society corrects."

My views also reflect the provisions of the Missouri Constitution (Mo.Const. Art. I, §§2 and 8). However, it would serve no useful purpose to implement the Missouri Constitution so long as we are constrained by the approach of *Roth* and its successors.

On May 17, 1979, the Supreme Court of Missouri overruled the State of Missouri's timely motion for rehearing by making the following order: "Respondent's motion for rehearing and alternatively, motion for 90 day stay of mandate, overruled."

APPENDIX B

Section 542.281, RSMo 1975 Supp., reads as follows:

542.281. Obscene matter, search warrant for—transcript of proceedings—hearing on obscenity—alteration of material after notice of hearing prohibited.—1. Any police officer, sheriff or deputy sheriff may make application for the issuance of a search warrant to search for and seize:

(1) Obscene matter being held or displayed for sale, exhibition, distribution, or circulation to the public, if such matter is of such a nature that the average person, applying contemporary community standards would find that the matter, taken as a whole, appeals to the prurient interest, if the matter depicts or describes, in a patently offensive way, sexual conduct specifically defined by Missouri law as obscene, and if the matter, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(2) Property which has been used by the owner, or used with his consent, as a raw material or as an instrument to publish or produce such obscene matter.

2. A warrant to search for obscene matter being held or displayed for sale, exhibition, distribution, or circulation or for property which has been used as a raw material or as an instrument to publish or produce such obscene matter may be issued by a judge of the circuit court in the county or judicial district in which the alleged matter or property is located. Except as provided in this section, the issuance of a warrant to search for and seize obscene matter shall be governed by the provisions of section 542.276.

3. A copy or photograph of the allegedly obscene matter may be annexed to the application. The application and the warrant, if issued, shall designate precisely

by title, or otherwise, each item or type of item to be searched for and seized. No warrant shall be issued to search for and seize any item or type of item unless the judge determines there is probable cause to believe that each item or type of item sought is obscene as defined by law, and is being held or displayed for sale, exhibition, distribution, or circulation to the public.

4. A transcript shall be made of all proceedings under this section and under subsections 3 and 4 of section 542.301.

5. If more than twenty items are to be seized, or if the item to be seized is a motion picture film being exhibited to the public, the judge shall hold an adversary hearing to determine whether such matter is obscene before issuing a warrant. Not less than twenty-four hours before such hearing, written notice of the date, time, place and nature of the hearing, including a description of the matter sought, shall be personally served upon the dealer, exhibiter, displayer or his agent. No warrant shall be issued without the dealer, distributor, or displayer being given a reasonable opportunity to appear in opposition to the issuance. Except when the dealer, exhibiter, or displayer consents to a longer period, or by his actions or pleadings, willfully prevents the prompt resolution of the hearing, a decision shall be rendered no later than ten days from the date of the commencement of the hearing. The hearing shall determine whether the average person, applying contemporary community standards would find that the matter sought, taken as a whole, appeals to the prurient interest, whether the matter sought depicts or describes, in a patently offensive way, sexual conduct specifically defined as obscene by the laws of this state, and whether the matter sought, taken as a whole, lacks serious literary, artistic, political, or scientific value. Upon determination

that there is probable cause to believe the matter sought is obscene, the judge shall issue a warrant to search for and seize it. After service of notice of the hearing, intentional alteration, destruction, or removal of any matter, or duplicate of matter, described in the notice shall be punished as contempt of court.

542.286. Warrant to be executed within territorial jurisdiction, exception.—1. A warrant to search a person or any movable thing may be executed in any part of the state where the person or thing is found if, subsequent to the filing of the application, the person or thing moves or is taken out of the territorial jurisdiction of the judge issuing the warrant.

2. All other search warrants shall be executed within the territorial jurisdiction of the court out of which the warrant issued and within the territorial jurisdiction of the officer executing the warrant.

Section 542.301, RSMo 1975 Supp., reads in pertinent part as follows:

542.301. Disposition of unclaimed seized property-forfeiture to the state, when-allegedly obscene matter, how treated-appeal authorized.

. . . .

3. (1) When a warrant has been issued to search for and seize allegedly obscene matter after an adversary hearing, the judge, upon return of the warrant with the matter seized, shall give notice of the fact to the prosecuting attorney of the county in which the matter was seized and the dealer, exhibiter, or displayer and shall conduct further adversary proceedings to determine whether the matter is subject to forfeiture. If the evidence is clear and convincing that the matter is obscene as de-

fined by law and it was being held or displayed for sale, exhibition, distribution, or circulation to the public, the judge shall declare it to be obscene and forfeited to the state and order its destruction. However, no forfeiture shall be declared without the dealer, distributor, or displayer being given a reasonable opportunity to appear in opposition and without the judge having thoroughly examined each item. Except when the dealer, exhibiter, or displayer consents to a longer period, or by his actions or pleadings willfully prevents the prompt resolution of the hearing, judgment shall be rendered within ten days of the return of the warrant. If the matter is not found to be obscene or is not found to have been held or displayed for sale, exhibition, or distribution to the public, or a judgment is not entered within the time provided for, the matter shall be restored forthwith to the dealer, exhibiter, or displayer.

(2) If an appeal is taken by the dealer, exhibiter, or displayer from an adverse judgment, the case should be assigned for hearing at the earliest practicable date and expedited in every way. Destruction of a matter declared forfeited shall be postponed until the judgment has become final by exhaustion of appeal, or by expiration of the time for appeal, and until the matter is no longer needed as evidence in a criminal proceeding.

(3) A determination of obscenity shall not be admissible in any criminal proceeding against any person or corporation for sale or possession of obscene matter.

4. (1) When allegedly obscene matter has been seized under a search warrant issued without a prior adversary hearing, or has been seized without a warrant, the officer, who executed the warrant or seized the matter without warrant, shall give notice of the fact of seizure to the prosecuting attorney of the county in which the

matter was seized. Within three days of the seizure the prosecuting attorney shall file a written motion with the circuit court of the county or judicial district in which the seizure occurred praying for an order directing the forfeiture of the matter. Upon filing of the motion, the court shall set a date for a hearing. Written notice of date, time, place, and nature of the hearing shall be personally served upon the owner, dealer, exhibiter, displayer, or his agent. Such notice shall be served no less than five days before the hearing.

(2) If the evidence is clear and convincing that the matter is obscene as defined by law, and it was being held or displayed for sale, exhibition, distribution, or circulation to the public, the judge shall declare it to be obscene and forfeited to the state and order its destruction. However, no forfeiture shall be declared without the dealer, distributor, or displayer being given a reasonable opportunity to appear in opposition and without the judge having thoroughly examined each item. Except when the dealer, exhibiter, or displayer consents to a longer period, or by his actions or pleadings willfully prevents the prompt resolution of the hearing, judgment shall be rendered within fifteen days from the date of the seizure. If the matter is not found to be obscene, or is not found to have been held or displayed for sale, exhibition, distribution, or circulation to the public, or a judgment is not entered within the time provided for, the matter shall be restored forthwith to the dealer, exhibiter, or displayer.

(3) If an appeal is taken by the dealer, exhibiter, or displayer from an adverse judgment, the case shall be assigned for hearing at the earliest practicable date and expedited in every way. Destruction of matter declared forfeited shall be postponed until the judgment has become final by exhaustion of appeal, or by expiration of the time

for appeal, and until the matter is no longer needed as evidence in a criminal proceeding.

(4) A determination of obscenity shall not be admissible in any criminal proceeding against any person or corporation for sale or possession of obscene matter.

5. An appeal by any party shall be allowed from the judgment of the court as in other civil actions.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-241

STATE OF MISSOURI,
Petitioner,

vs.

ALL STAR NEWS AGENCY, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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OPINION BELOW

The opinion of the Supreme Court of Missouri reversing the judgments below is reported in *State v. All Star News Agency, Inc.*, 580 S.W.2d 245 (Mo. banc 1979).

JURISDICTION

Respondent accepts petitioner's jurisdictional statement.

QUESTION PRESENTED

Whether the total prohibition of All Star News Agency, Inc.'s ability to continue to sell and distribute magazines and movies from the time of the service of a Notice of Adversary Hearing

by the State constituted an illegal prior restraint of materials presumptively protected under the First Amendment in violation of the First, Fourth and Fourteenth Amendments.

STATEMENT OF THE CASE

This petition deals with a proceeding wherein the State of Missouri sought the forfeiture and destruction of one thousand films and thirteen thousand magazines from the premises of All Star News Agency of St. Louis, Inc. (hereinafter referred to as All Star) located at 3721 Washington Avenue, St. Louis, Missouri.

Briefly, the materials were seized pursuant to two search warrants, the first for the seizure of movies and the second for the seizure of magazines. Prior to the issuance of the warrants, Notice of Adversary Hearings were served on All Star and adversary hearings were conducted. Thereafter, the warrants were executed, seizures made, motions to quash the warrants were heard and overruled and the cases were consolidated for trial. Most of the items were shown to an advisory jury which declared almost all to be obscene. The Court then made an independent determination and agreed with jury's findings on all but a few items. He issued Declarations of Forfeiture and Orders for Destruction which were stayed pending appeal by All Star.

The relevant facts are as follows: On September 9, 1977, the State of Missouri requested the Circuit Court to issue a Notice of Adversary Hearing. The notice listed 153 magazines and movies by name. Item 154 was a general category which stated, ". . . and other magazines and motion picture films which depict, describe, or portray, pictorially, acts of sexual intercourse, . . ." The notice also stated that "intentional alteration, destruction or removal of any matter, or duplicate of matter described in the notice shall be subject to contempt of court proceedings." Pursuant to the provisions of Section 542.281, R.S. Mo. 1974, the notice was signed and it was served that same day on All Star (Tr. 4,22).

The adversary hearing began on September 19, 1977 (Tr. 2). Prior to the taking of testimony, counsel for All Star filed a Motion to Dismiss and Dissolve Notice of Adversary Hearing (Tr. 2-4) which was argued (Tr. 4-18) and overruled (Tr. 18). Testimony commenced on September 20 and various police officers and an investigator from the Circuit Attorney's office testified and filed written affidavits in support of their testimony (Tr. 23-94, 103, 112). During the course of the testimony the judge stated that he would not issue a search warrant for any materials which another circuit judge had under submission as a result of a prior mass seizure from All Star (Tr. 94-96, 98). Thereafter, the State withdrew its original application for a search warrant and filed an amended application (Tr. 101), which listed 10 brand names of films and a series of movies in each of the brands by number and contained an eleventh item which was a catch-all category. Exhibits numbered 43 through 52 were renumbered as A1 through A10 (Tr. 103-104). At the conclusion of the testimony, the judge viewed 10 movies, one each from series A1 through A10 (Tr. 114-116). Counsel for All Star objected to the issuance of the search warrant for other than the specific films viewed by the Court but the objection was overruled (Tr. 117-118). The Court ordered that the search warrant issue for the 10 films and the series to which they belonged and included a catch-all category for other films (Tr. 124, 252-254). After the hearing adjourned on September 21, 1977 (Tr. 126) 1000 films were seized pursuant to the search warrant. Except for the 10 films viewed by the judge (and any duplicates thereof), the other 990 films which were ultimately seized were not viewed during this adversary hearing, and they were not viewed by anyone until the jury saw them some months later.

Immediately following that hearing, on September 21, 1977, the State of Missouri requested that the Circuit Court issue another Notice of Adversary Hearing which was granted, assigned to a different judge and served on All Star that same day. This notice listed by name the same 117 magazines originally listed in the notice of the prior hearing (Tr. 133, 307-308). Item 118 was a general category which stated, ". . . and other magazines which depict, describe, or portray, pictorially, acts of sexual intercourse, . . .". As with the previous notices, this notice stated that intentional alteration, destruction or removal of any matter, or duplicate of matter, described in the notice would be subject to contempt of court proceedings. Police officers were stationed outside All Star's warehouse to insure that no material was removed.

The second adversary hearing began on September 23, 1977 (Tr. 127), and Counsel for All Star again filed a Motion to Dismiss and Dissolve Notice of Adversary Hearing which was argued and overruled (Tr. 127-149). Officers assigned to the St. Louis Police Department Vice Squad testified and filed written affidavits in support of their testimony (Tr. 190-236). An application for a search warrant was presented to the court (Tr. 190), and on September 29, 1977, the judge issued a search warrant which listed 117 magazines (Tr. 291). Of the 13,000 magazines ultimately seized, approximately twelve thousand nine hundred (12,900) magazines were neither viewed by the judge during this adversary hearing, nor were they listed specifically in the warrant, except for the few which may have been duplicates of the ones the judge did review.

The return on the search warrant for the seizure of movies was filed on September 29, 1977 (Tr. 259). On October 5, 1977 counsel for All Star filed a Motion to Quash the search warrant (Tr. 254-258) and the hearing held on October 7 (Tr. 259). Of the 10 brands of films listed in the warrant, officers seized movies of eight of the brands (Tr. 262-263). All

films found on the premises were seized (Tr. 255-256); none were viewed on the premises (Tr. 262-263,266). The decision to seize films not listed in the warrant was made after examining the boxes in which they were contained (Tr. 266-271). Also seized were reels of film contained in plastic cassettes (Tr. 276-277, 280), some of which were untitled and others which had pictures attached (Tr. 280, 282-283). At the conclusion of the hearing, the Motion to Quash was overruled (Tr. 290).

The return of the search warrant for the seizure of magazines was filed on October 6, 1977 (Tr. 291,306). On October 14, 1977 counsel for All Star filed a Motion to Quash the search warrant (Tr. 292-296) and the hearing on the motion disclosed the following facts: (Tr. 301) Detective Sergeant Vincent Stehlin testified that 12,955 magazines were seized (Tr. 304). Of these, there were 403 different magazines (Tr. 305). Only 43 of the 117 titles listed in the search warrant were found at All Star (Tr. 310). All the other magazines were seized under the general category. (Tr. 305).

Sergeant Stehlin stated that he was the one who made the decision as to which magazines were to be seized (Tr. 313). His procedure consisted of looking at some magazines for thirty seconds, and at some for four or five minutes (Tr. 315,409), skimming through the textual materials in the magazines (Tr. 315). If magazines contained what Sgt. Stehlin felt was deviant sexual acts or explicit pictorial acts of sexual intercourse, sodomy or masturbation they were seized (Tr. 316). He seized a magazine if it contained only one picture which he felt fell within the search warrant or violated state law (Tr. 417). Most of the stock of magazines was seized (Tr. 316) including some which were similar to ones declared not obscene by the Court in previous proceedings, (Tr. 317-319). At the conclusion of his testimony the Motion to Quash was overruled (Tr. 330).

The two cases were consolidated for purposes of trial before a third judge (Tr. 352-353). Voir dire examination was

conducted on November 17, 1977, and the presentation of evidence commenced on November 18 (Tr. 372). All Star preserved its objections to the introduction of the evidence at trial (Tr. 388-389, 430-432). It was during this three week jury trial that for the first time, the more than 12,000 magazines and 900 films seized by virtue of the general category in each of the two warrants were viewed.

The jury verdict declared most of the items to be obscene by less than unanimous verdicts (Tr. 520-532) and declared 8 exhibits not to be obscene. The jury was unable to return verdicts on 23 items (Tr. 532). These verdicts, some two and one-half months after the items were seized, constituted the first determinations as to the nature of the items seized pursuant to the general categories in both warrants.

After hearings were concluded on post-trial motions, Notices of Appeal were duly filed to the Missouri Supreme Court on February 3, 1978 (Tr. 563-565). The Supreme Court of Missouri en banc reversed and remanded in an opinion rendered April 10, 1979, holding that the procedures followed by the State constituted an illegal prior restraint of materials presumptively protected by the First Amendment of the Constitution of the United States. (see pages A3-A4 of Petitioner's Petition).

Thereafter, the State's Motion for Rehearing was denied, the Missouri Supreme Court issued its Mandate and all the items seized were returned to All Star.

ARGUMENT

> "I think the Notice guarantees that nothing is going to be shipped out." Mr. Hoag, Assistant Circuit Attorney (Tr. 14).

On September 9, 1977, a Notice of Adversary Hearing was served upon the "Owner-Manager-Employees of All Star News Agency". This notice contained 153 specifically delineated titles concerning magazine publications and movies. At the time of the service the notice also contained an item 154 which was in the nature of a "catch-all" phrase which shall be specified later herein. On September 21, 1977, a like notice was also served on All Star. This particular notice listed 117 specific items and contained an item 118 in the nature of a "catch-all" phrase. Both of these phrases and the notice that was served were identical. The notice in each instance went on to recite language paraphrasing § 542.281, paragraph 5, R.S.Mo., as follows:

> "Upon receipt of this Notice of Adversary Hearing, intentional alteration, destruction or removal of any matter, or duplicate of matter described in the Notice shall be subject to 'Contempt of Court' proceedings."

In each instance, the Order is signed by the Honorable Clyde S. Cahill, Jr., Judge of the Circuit Court. Both notices were served by Sgt. Vincent Stehlin. These two Notices of Adversary Hearing were not the first to be so served on All Star. On June 6, 1977, the first notice was served and a hearing was held. At the time the hearing on the instant notices commenced, the outcome of the hearing on the first notice and seizure had not yet been determined (Tr. 7). As a result of this second notice, All Star was effectively out of the movie business from September 9, 1977, until all of its stock of films was seized under the search warrant issued on September 21, 1977. It was put out of the magazine business from the time of the

second notice, September 9, until execution of the September 29 warrant when its stock of magazines was seized.

Sections 542.281 to 542.301, inclusive, R.S.Mo., are unconstitutional as they result in the imposition of an absolute prior restraint on materials which are presumptively protected, and afforded the protections under the First and Fourteenth Amendments of the Constitution of the United States and Article I, Section 8 of the Constitution of the State of Missouri. In *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973), this Court stated, ". . . prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness."

In the instant cases, specifically enumerated items were examined by the issuing judge, but the notice in each contained a general category, and this general category related back in language that is incapable of precise meaning. Not only did All Star face the potential threat of contempt of court for selling a magazine or movie that was not specifically named in the notice, as provided by Statute, supra, but its right to so traffic in these materials was totally restricted by the presence of police officers at the entrances and exits to the premises occupied by All Star. Furthermore, and perhaps most importantly, the great majority of the items finally seized were in the general category and were not examined by either a judge or a jury for several months after the initial seizure. During all this time, All Star was unable to sell the materials and the public was deprived of its right to obtain them. The Missouri Supreme Court realized that the approach the State took in this case was more effective than any injunction that could have been obtained. The procedure which was devised by the State was designed to side-step the procedural safeguards guaranteed to the respondent by the Constitution of the United States, as noted. The specificity requirement as set forth in *Miller v. California*, 413 U.S. 15 (1973), is definitive of the inadequacy of the general "catch-all"

provisions and their ultimate affect as contained in the notices in the case at bar.

In the landmark case of *Marcus v. Search Warrants*, 367 U.S. 717 (1961), this Court discussed the impropriety of a prior statutory procedure in Missouri which permitted a prior restraint of presumptively protected materials. The Court stated (l.c. 736-738):

> "But there is no doubt that an effective restraint—indeed the most effective restraint possible—was imposed prior to hearing on the circulation of the publications in this case, because all copies on which the police could lay their hands were physically removed from the newsstands and from the premises of the wholesale distributor. An opportunity comparable to that which the distributor in Kingsley Books might have had to circulate the publication despite the interim restraint and then raise the claim of non-obscenity by way of defense to a prosecution for doing so was never afforded these appellants because the copies they possessed were taken away. Their ability to circulate their publications was left to the chance of securing other copies, themselves subject to mass seizure under other such warrants. The public's opportunity to obtain the publications was thus determined by the distributor's readiness and ability to outwit the police by obtaining and selling other copies before they in turn could be seized. In addition to its unseemliness, we do not believe that this kind of enforced competition affords a reasonable likelihood that nonobscene publications, entitled to constitutional protection, will reach the public. A distributor may have every reason to believe that a publication is constitutionally protected and will be so held after judicial hearing, but his belief is unavailing as against the contrary judgment of the police officer who seizes it from him. Finally, a subdivision of the New York statute in Kingsley Books required that a judicial decision

on the merits of obscenity be made within two days of trial, which in turn was required to be within one day of the joinder of issue on the request for an injunction. In contrast, the Missouri statutory scheme drawn in question here has no limitation on the time within which decision must be made, only a provision for rapid trial of the issue of obscenity. *And in fact over two months elapsed between seizure and decision.* In these circumstances the restraint on the circalculation (sic) of publications was far more thoroughgoing and drastic than any restraint upheld by this Court in Kingsley Books." (Emphasis added)

The concept of the seizure itself is contrary to *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), in that before the final hearing all merchandise and items in question may be seized or effectively restrained from sale. The general inclusions of the "catch-all" category without any specificity to it creates a situation whereby there is not a determination of those matters until the ultimate jury trial. A period of time necessarily had to pass where the recipient of the notice is subject to the penalties of contempt based upon vague and imprecise descriptions of a category of material that he might sell at its own risk. However, in these cases the Petitioner removed even this possibility of continued circulation of books and films by placing police officers at all entrances and exits of the respondent's warehouse. True to the statement of the Assistant Circuit Attorney, supra, nothing was brought in or out throughout the pendency of the cases. The notices were served on September 21, 1977, but a final judgment was not rendered until January 11, 1978, in each case (Tr. 552 et seq.). Hence, contrary to Petitioner's assertions, there was in fact approximately four (4) months of total suppression even though some items were later found not obscene and protected. While it is now clear that the government can regulate the sale of obscene material, it is equally manifest it can do so only, ". . . under the procedural safeguards designed to obviate the dangers of censorship

system." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). One of the primary safeguards is a "prompt final judicial determination" that the material to be censored is, in fact, obscene. See also *Freedman v. Maryland*, 380 U.S. 51 (1965). In the absence of a prompt, prior judicial determination any action which abates or censors the exhibition of films or magazines violates the constitutional principle against prior restraint of presumptively protected material. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 367 (1971); *Freedman v. Maryland, supra*, at page 58; *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957).

Put very directly and simply, the sale or distribution of any material can not be restrained in any form or manner and especially by threat of contempt without a court first making a specific determination that the particular item, be it newspaper, magazine, film or any media, is obscene. Actual physical restraint compounds the constitutional invalidity of the procedure.

Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931), is directly on point. The statute in question in *Near* did not require approval of all publications before distribution. Rather, it allowed a court to enjoin the publication of a "malicious, scandalous and defamatory" newspaper (see page 702). The injunction was issued after Near had published nine (9) such newspapers. On appeal, the Supreme Court struck the statute down because it allowed a restraint of future publications based on the offensiveness of past publications. Similarly, here, the threat of contempt chilled the respondent's right to sell movies or magazines prior to any final determination of obscenity vel non.

The distinction between restraint based on judgment that specific material is obscene and prior restraint without such adjudication is clearly drawn in *Kingsley Books, Inc. v. Brown, supra* (l.c. 445):

"It only remains to say that the difference between *Near v. Minnesota*, 283 U.S. 697, 75 L.Ed. 1351, 51 S.Ct. 625, supra, and this case is glaring in fact. The two cases are no less glaringly different when judged by the appropriate criteria of constitutional law. *Minnesota empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive*. In the language of Mr. Chief Justice Hughes, *'This is of the essence of censorship.'* 283 U.S. 713. As such, it was found *unconstitutional*. This was enough to condemn the statute wholly apart from the fact that the proceeding in *Near* involved no obscenity but matters deemed to be derogatory to a public officer. Unlike *Near*, Section 22-a concerned solely with obscenity and, as authoritatively construed, it *studiously withholds restraint upon matters not already published and not yet found to be offensive.*" (Emphasis added).

Beyond doubt, there is no "studious restraint upon matters not already published and not yet found to be offensive." Respondent is unable to impose any such constitutional restraint upon itself.

An examination of relevant decisions from other jurisdictions will show the blatant illegality of the procedure employed by the State. That these statutes may be employed by the Petitioner to "censor" and "restrain" future sales of books. magazines and films by threat of contempt of court and the use of police officers, and be allowed to so function for a period of some four (4) months before a final judicial determination is made was the compelling reason for the Missouri Supreme Court to find the statutes at bar, and the procedures employed, to be in violation of the First, Fourth and Fourteenth Amendments of the Constitution of the United States.

The facts in the cases at bar should be compared with those as discussed in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49

(1973), wherein those proceedings forbade the removal of films until the date of hearing but allowed their continued exhibition. The Court approved that scheme only because there was an allowed continued exhibition of the materials or films until such time as there was a prompt and final judicial determination. The decision of this Court in *Kingsley Books, supra*, stands for the proposition that books or films may not be enjoined until there has been an individual determination of obscenity. Accord: *Organization For a Better Austin v. Keefe*, 402 U.S. 415 (1971). The result of Petitioner's actions was to reverse the concept of presumptive protection of First Amendment materials to censorship by the State pending judicial affirmation, an action which the Supreme Court of Missouri recognized as improper.

In its brief, Petitioner argues that the recent decision of this Court in *Lo-Ji Sales, Inc. v. New York*, — U.S. —, 99 S. Ct. 2319 (1979) would not control on remand. Respondent would strenuously disagree. This issue was briefed and argued in the Missouri Supreme Court, but the Court did not reach the issue in rendering its opinion.

In the instant case, as in *Lo-Ji, supra*, the great majority of the materials were not specifically listed in the search warrant. Rather than have a determination of obscenity vel non made by a neutral, detached judicial officer, Sgt. Vincent Stehlin of the Vice Squad exercised his discretion in determining which materials would be seized.

This Court has previously declared improper a Missouri search warrant which contained catchall language because it did not provide adequate safeguards to insure against the seizure of non-obscene materials. In *Marcus v. Search Warrant*, 367 U.S. 717 (1961), the Court distinguished the procedure approved in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957) from the warrants issued by the Missouri Courts. The Court stated (l.c. 735):

> "*Second*, the restraints in Kingsley Books, both temporary and permanent, ran only against the named publication; no catchall of all 'obscene' material was imposed on the defendants there, comparable to the warrants here which authorized a mass seizure and the removal of a broad range of items from circulation."

See also, the opinion of the Louisiana Supreme Court in *Parish of Jefferson v. Bayou Landing Ltd., Inc.*, 350 S.2d 158 (1977) and *In Re Search Warrant of Property, Etc.*, 369 S.W.2d 155 (Mo.1963).

The search warrants issued in the instant cases were nearly identical to the *Lo-Ji* warrant. Each warrant contained an enumerated list of items but then included a general category which in each instance began with the vague and overbroad clause, "and other magazines (films) . . .". One warrant listed 117 items and the other only 10 titles. Yet the executing officers used these warrants as issued to seize 12,955 magazines (Tr. 304) and 1,000 films (Tr. 385). By admission some 360 magazine titles, of a total of 403 titles, and all copies thereof although not enumerated were seized. (Tr. 305). This was not a search for the materials specifically listed in the warrants. The executing officer used the general category of the warrant as a justification to replace the ruling of the trial court with his own discretion in interpreting the warrant. When asked why additional magazines were seized, the testimony was, "Because in my opinion they fell within the scope of the warrant." (Tr. 305).

In *Lo-Ji*, this Court stated (l.c. 99 S.Ct.2324):

> ". . . the warrant left it entirely to the discretion of the officials conducting the search to decide what items were likely obscene and to accomplish their seizure. The Fourth Amendment does not permit such action. *Roaden v. Kentucky*, 413 U.S. 496, 502, 93 S.Ct. 2796, 2800, 37 L.

> Ed.2d 737 (1973); *Stanford v. Texas, supra*, 379 U.S. at 485, 85 S.Ct., at 511; *Marcus v. Search Warrant, supra*, 367 U.S., at 732, 81 S.Ct., at 1716."

Because it held that there was an illegal prior restraint the Missouri Supreme Court did not reach the merits of respondent's contentions that the search and seizure herein was clearly improper. Should this Court grant petitioner's Writ of Certiorari and remand the case to the Missouri Supreme Court, respondent submits that *Lo-Ji Sales, Inc. v. New York, supra*, would be controlling.

CONCLUSION

For the foregoing reasons, we respectfully suggest that the Petition for Certiorari be denied.

Respectfully submitted,

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